HARTA EMPAT SDN. BHD.

v.

KOPERASI RAKYAT BHD.

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABU MANSOR ALI JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: A-02-602-1995]
24 JANUARY 1997

LAND LAW: *Charge - Validity of - National Land Code 1965, s. 241(3)(a) - Whether charge prohibited by any written law - National Land Code 1965, s. 301(c) - Whether charge fit for registration - Whether charge executed in contravention of s. 133(1) of Companies Act 1965*

COMPANY LAW: *Charges - Land - Company land charged as security for loan given to director by another person - Companies Act 1965 s. 133(1) - Whether contravened - Whether fact that loan was for company's purposes absolved company from prohibition against provision of security to director - Whether charge fit for registration under s. 301(c) of National Land Code 1965 - Whether charge valid*

The appellant had executed a charge over its land as security for a loan given to one of its directors by the respondent. The loan was not for the benefit of the said director but for the purposes of the appellant. Subsequently, the appellant applied for a declaration that the said charge was null and void for not being in compliance with s. 133 of the Companies Act 1965 ('the Act') and for an order cancelling the registration of the charge. The question which arose eventually arose for decision was whether the provisions of the National Land Code 1965 ('the Code') operated to invalidate the charge.

Held:

Per NH Chan JCA

[1] By virtue of s. 241 of the Code, immovable property may be charged under the Code; however, this is subject to any prohibition imposed by the Code or by any other written law as envisaged by s. 241(3)(a) of the Code.

[1a] This means that a charge is subject to "any prohibition ... imposed by ... any ... written law for the time being in force" (as envisaged by s. 241(3)(a) of the Code), and is effected by an instrument in Form 16A (pursuant to s. 242(1) of the Code) which will take effect upon

registration (as provided by s. 243 of the Code) so as to render the immovable property charged liable as security for the payment of money (as provided by s. 241(1) of the Code).

[1b] The charge is registered by presentation of the Form 16A instrument to the Registrar (pursuant to s. 292(1)(c) of the Code), but only if the charge instrument is fit for registration (as envisaged by s. 301 of the Code), which is to say "that the dealing which it effects is not contrary to any prohibition ... imposed by ... any ... written law for the time being in force (as provided by s. 301(c) of the Code).

[2] Section 133(1) of the Act imposes a blanket prohibition on loans by a company (other than an exempt private company) to a director of the company, and on the giving of a guarantee or the provision of security by the company in connection with a loan made to its director by another person. However, the prohibition in s. 133(1) of the Act will not apply if it is "done to provide such a director with funds to meet expenditure incurred or to be incurred by him for the purposes of the company" as provided by s. 131(1)(a) of the Act.

[2a] In the instant appeal, the loan was not meant to meet the disbursements of the said director; consequently, the prohibition in s. 133(1) of the Act against the appellant providing the security still applied.

[2b] The fact that the loan was not for the benefit of the director but for the purposes of the appellant did not absolve the appellant from the prohibition against the provision of security as contained in s. 133(1) of the Act. In the result, the prohibition in s. 133(1) of the Act had rendered the charge over the appellant's land unfit for registration under s. 301(c) of the Code. The said charge was, therefore, invalid.

Per curiam:

[1] Section 133(1) of the Act, by itself, does not invalidate the forbidden transactions – so that the company may incur civil liability for entering into them. But before the company can be made liable, the transactions themselves must be valid and enforceable.

[2] The question whether s. 133(1) of the Act operates to invalidate a security provided by a company for a loan made to a director of the company by another person in contravention of the sub-section or whether it merely prohibits the giving of such security on pain of incurring criminal liability is no longer justiciable, at least in this country, since the decision of the Federal Court in *The Co-operative Central Bank Limited v. Feyen Development Sdn. Bhd.*

[Appeal allowed; charge declared invalid and ordered to be cancelled.]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG TANAH: *Gadaian - Keesahan - Kanun Tanah Negara 1965, s. 241(3)(a) - Samada gadaian dilarang oleh mana-mana undang-undang bertulis - Seksyen 301(c) Kanun Tanah Negara 1965 - Samada gadaian sesuai untuk pendaftaran - Samada gadaian disempurnakan dalam pelanggaran s. 133(1) Akta Syarikat 1965*

UNDANG-UNDANG SYARIKAT: *Gadaian - Tanah - Tanah syarikat digadaikan sebagai jaminan kepada pinjaman yang diberikan kepada pengarah oleh seorang lain - Akta Syarikat 1965, s. 133(1) - Samada melanggari - Samada hakikat bahawa pinjaman adalah untuk tujuan syarikat membebaskan syarikat daripada larangan terhadap peruntukan jaminan kepada pengarah - Samada gadaian sesuai untuk pendaftaran di bawah s. 301(c) Kanun Tanah Negara 1965 - Samada gadaian sah*

Perayu telah menyempurnakan satu gadaian ke atas tanahnya sebagai jaminan kepada satu pinjaman yang diberikan kepada salah seorang pengarahnya oleh responden. Pinjaman tersebut adalah bukan untuk kepentingan pengarah tersebut tetapi bagi tujuan perayu. Kemudiannya, perayu telah memohon untuk mendapatkan satu pengisytiharan bahawa gadaian tersebut adalah batal dan tak sah kerana tidak mematuhi s. 133 Akta Syarikat 1965 ("Akta tersebut") dan bagi perintah untuk membatalkan pendaftaran gadaian tersebut. Persoalan yang berbangkit pada akhirnya ialah samada peruntukan-peruntukan Kanun Tanah Negara 1965 ("Kanun") beroperasi bagi mentaksahkan gadaian tersebut.

Diputuskan:

Oleh NH Chan HMR

[1] Menurut s. 241 Kanun, hartanah tak boleh alih boleh digadaikan di bawah Kanun tersebut; walaubagaimanapun, hal ini adalah tertakluk kepada apa-apa larangan yang dikenakan oleh Kanun tersebut atau menurut mana-mana undang-undang bertulis yang lain sepertimana yang dibayangkan oleh s. 241(3)(a) Kanun.

[la] Ini bermakna bahawa sesuatu gadaian adalah tertakluk kepada "any prohibition ... imposed by ... any ... written law for the time being in force" (sepertimana yang dibayangkan oleh s. 241(3)(a) Kanun), dan adalah dikuatkuasakan oleh suatu suratcara dalam borang 16A (selaras dengan s. 242(l) Kanun) yang mana berkuatkuasa setelah pendaftaran (sepertimana yang diperuntukan oleh s. 243 Kanun tersebut) bagi menjadikan hartanah tak alih itu bertanggungan sebagai jaminan untuk pembayaran wang (sepertimana yang diperuntukan oleh s. 241(1) Kanun.

[lb] Gadaian tersebut didaftarkan dengan pengemukaan suratcara borang 16A kepada Pendaftar (se1aras dengan s. 292(1)(c) Kanun), tetapi hanya jika suratcara gadaian itu sesuai untuk pendaftaran (sepertimana yang dibayangkan oleh s. 301 Kanun), yang mana adalah "that the dealing which it effects is not contrary to any prohibition... imposed by... any... written law for the time being in force" (sepertimana yang diperuntukkan oleh s. 301(c) Kanun).

[2] Seksyen 133(1) Akta mengenakan satu larangan yang menyeluruh ke atas pinjaman-pinjaman oleh sesebuah syarikat (selain daripada sebuah syarikat persendirian yang dikecualikan) kepada seorang pengarah syarikat tersebut, dan berhubung dengan pemberian suatu gerenti atau peruntukan jaminan oleh syarikat itu berhubung dengan suatu pinjaman yang dibuat kepada pengarahnya oleh seorang yang lain. Walaubagaimanapun, larangan dalam s. 133(l) Akta tersebut tidak akan terpakai jika ianya "is done to provide such a director with funds to meet expenditure incurred or to be incurred by him for the purposes of the company" sepertimana yang diperuntukkan oleh s. 131(1)(a) Akta.

[2a] Dalam rayuan semasa ini, pinjaman tersebut tidak bertujuan untuk menampung pembayaran-pembayaran pengarah tersebut, akibatnya, larangan dalam s. 133(l) Akta terhadap perayu memberikan jaminan masih terpakai.

[2b] Hakikat bahawa pinjaman itu bukannya bertujuan untuk kepentingan pengarah tersebut tetapi adalah untuk tujuan-tujuan perayu tidak membebaskan perayu daripada larangan terhadap peruntukan jaminan sepertimana yang terkandung dalam s. 133(1) Akta. Hasilnya, larangan dalam s. 133(1) Akta telah menjadikan gadaian ke atas tanah perayu tidak sesuai untuk didaftarkan di bawah s. 301(c) Kanun. Gadaian tersebut adalah, dengan itu, tak sah.

Per curiam:

[1] Seksyen 133(1) Akta, secara bersendirian, tidak mentaksahkan transaksi yang dilarang itu - dan dengan itu syarikat boleh mengalami tanggungan sivil kerana memasukinya. Tetapi sebelum syarikat itu boleh dijadikan bertanggungan, transaksi itu sendiri mestilah sah dan berkuatkuasa.

[2] Persoalan samada s. 133(1) Akta beroperasi bagi mentaksahkan sesuatu jaminan yang diperuntukkan oleh sesebuah syarikat bagi pinjaman yang telah dibuat kepada seorang pengarah syarikat itu oleh seorang yang lain dalam melanggari seksyen kecil itu atau samada ianya semata-mata melarang pemberian jaminan yang sedemikian dengan risiko akan mengalami

tanggungan jenayah tidak lagi merupakan sesuatu yang justiciable, sekurang-kurangnya di negeri ini, sejak keputusan Mahkamah Persekutuan dalam *The Cooperative Central Bank Limited v. Feyen Development Sdn. Bhd.*

[Rayuan dibenarkan; gadaian diisytiharkan tak sah dan diperintahkan supaya dibatalkan.]

Cases referred to:
Co-operative Central Bank Ltd. v. Feyen [1995] 4 CLJ 300 ***(refd)***
Harta Empat Sdn. Bhd. v. Koperasi Rakyat Berhad [1995] 4 CLJ 597 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 133(1), 133(1)(a)
Co-operative Societies Act 1948, ss. 21(1), 30
National Land Code 1965, ss. 241, 241(3)(a), 242, 243, 292, 292(1)(c), 301

[Appeal from High Court Malaya, Ipoh; Originating Summons No: 24-995-91; [1995] 4 CLJ 597]

For the appellant - Hira Singh (T. Gunaseelan with him); M/s. Asbir Hira Singh & Co.
For the respondent - C.V. Das (John Mathew with him); M/s. T.H. Su & Co.

JUDGMENT

NH Chan JCA:

The question whether s. 133(1) of the Companies Act 1965 operates to invalidate a security provided by a company for a loan made to a director of the company by another person in contravention of the subsection or whether it merely prohibits the giving of such security on pain of incurring criminal liability is no longer justiciable, at least in this country, since the decision of the Federal Court in *Co-operative Central Bank Ltd. v. Feyen* [1995] 4 CLJ 300; [1996] 1 SCR 75; [1995] 3 MLJ 313.

Section 133(1) forbids, subject to exceptions, a company making a loan to a director of the company. It also forbids the giving of a guarantee or the provision of security by the company in connection with another lender's loan to a director of the company.

The subsection by itself does not invalidate the forbidden transactions, so that the company may incur civil liability for entering into them; see *Feyen* However, before the company can be made liable, the transaction itself must be a valid and enforceable one. In the instant case, we are concerned with a charge under the National Land Code so that the question that arises is whether the provisions of the National Land Code operate to invalidate the charge.

Feyen did not refer to the provisions of the National Land Code when it considered the question of the validity of the two charge transactions in the case, nor did it discuss them. Therefore, any opinion expressed by *Feyen* on the validity of a charge must necessarily be *obiter*. See, especially, this passage ([1996] 1 SCR at 94; [1995] 3 MLJ at 330);

> To summarise, **our conclusion is that accepting that the charge transaction did breach s. 133(1) of the Act, no civil consequences flowed therefrom, that is to say, no voidness or unenforceability attached to** the loan or **the charge transactions,** regard being had to the context and purpose of s. 133(1), and especially the principle underlying s. 133(5), as explained above, which regrettably the learned Judge failed to take into account or to give proper weight to, with the result that his judgement cannot stand. (we have suplied the emphasis)

We shall now deal with the relevant provisions of the National Land Code.

The National Land Code.

In Part 16 of the National Land Code 1965 (which deals with charges), s. 241 states:

> 241(1) Subject to sub-section (3) -
>
> (a) the whole, but not a part only, of any alienated land;
>
> (b) the whole, but not a part only, of any undivided share in alienated land; and
>
> (c) any lease of alienated land,
>
> may be charged under this Act with -
>
> (aa) the repayment of any debt, or the payment of any sum other than a debt; or
>
> (bb) the payment of any annuity or other periodic sum.
>
> (2) ...
>
> (3) The said powers shall be exercisable in any particular case **subject to**
>
> (a) **any prohibition** or limitation **imposed by** this Act or **any** other **written law for the time being in force;** (we have supplied the emphasis)

So that by s. 241 immoveable property may be charged under the Code, but this is subject to any prohibition by written law against the charge (sub-s. (3)(a)). Section 242 provides for the creation of such a charge. It states:

> 242 (1) Every charge to secure the repayment of a debt, or the payment of any sum other than a debt, (in either case, whether the amount in question is to be paid as a lump sum or by instalments) shall be effected by an instrument in Form 16A.

And s. 243 says that the charge takes effect upon registration by rendering the property charged liable as security. It states:

> 243 Every charge created under this Act shall take effect upon registration so as to render the land or lease in question liable as security in accordance with the provisions thereof, express or, implied.

Part 18 of the National Land Code deals with the registration of dealings in land and in s. 292 it deals specifically with the instruments which may be registered under this Part. The section states:

> 292 (1) The following instruments may be registered under this Part, and may be presented to the Registrar for that purpose provisions in accordance with the provisions of sub-section (2)
>
> (a) ...
>
> (b) ...
>
> (c) any charge, discharge or instrument of postponement under Part Sixteen;

And s. 301 condition (c), which is under this Part, states:

> 301 **An instrument shall be fit for registration** under this Part **if but only if,** the following conditions are satisfied
>
> (a) ...
>
> (b) ...
>
> (c) that **the dealing which it effects is not contrary to any prohibition** or limitation imposed by this Act or **any** other **written law for the time being in force,** or to any restriction in interest to which the land in question is for the time being subject; (we have supplied the emphasis)

This means that a charge is subject to "any prohibition ... imposed by ... any ... written law for the time being in force" (s. 241(3)(a)) and is effected by an instrument in Form 16A (s. 242(1)) which will take effect upon registration (s. 243) so as to render the immoveable property charged liable as security for the payment of money (s. 241(1)).

The charge is registered by presentation of the Form 16A instrument to the Registrar (s. 292(1)(c)) only if the charge instrument is fit for registration (s. 301) which is to say "that the dealing which it effects is not contrary to any prohibition ... imposed by ... any ... written law for the time being in force" (s. 301 condition (c)).

Put shortly, a charge is subject to "any prohibition ... imposed by ... any ... written law for the time being in force" (s. 241 (3)(a). The charge takes effect upon registration (s. 243). Registration of the charge is obtained by

presenting it to the Registrar (s. 292 (1)(c)) but only if the charge is fit for registration (s. 301), and the charge is fit for registration if condition (c) of s. 301 is satisfied, that is to say, "that the dealing which it effects is not contrary to any prohibition ... imposed by ... any ... written law for the time being in force" (s. 301 condition (c)).

Mr. Hira Singh or the appellant submits that there is a prohibition imposed by a written law currrently in force, namely, s. 133(1) of the Companies Act 1965 against the dealing which is effected by the charge, thus rendering the charge unfit for registration. Therefore, the registered charge is void and should be cancelled.

Section 133(1) Companies Act 1965

This is the section which imposes a blanket prohibition on loans by a company (other than an exempt private company) to a director of the company, and on the giving of a guarantee or the provision of security by the company in connection with a loan made to its director by another person.

In the instant case, although the charge was to provide security by the appellant company in connection with a loan made to its director by the respondent, the Judge at first instance had found that the director had borrowed the money, not for himself but, for the benefit of the appellant company. This is what the Judge said *(Harta Empat Sdn. Bhd.* v. *Koperasi Rakyat Berhad* [1995] 4 CLJ 597; [1995] 3 AMR 2488 at p. 2499):

> ... upon perusal, and the interpretation of the documentary and affidavit evidence, I am convinced that, despite the fact that the said Lim Chin Hin was the borrower of the said sum, it was purely for the benefit of the plaintiff company. This is evidenced by the payment of the sum of RM1,994,900 to Public Finance Bhd. to redeem the lands charged by the said company to the bank, for the purposes of development, and a further sum of RM2,062 million was subsequently remitted to the then solicitors for the company on 19 September 1985. The Court in arriving at a fair and just decision must look beyond the form adopted, and examine the reality. It is of paramount importance to determine the purpose of the parties concerned, in regard to the obtaining of the loan.
>
> ... It cannot be denied that upon perusal of the facts and documents, the plaintiffs assisted this Lim Chin Hin to apply for the loan from the defendant company. After the loan was obtained, the plaintiffs used the monies for their own benefit.

From the Judge's finding it is clear that the charge in the instant case was intended to provide the security in connection with a loan made to a director of the appellant company so as to enable the borrowed funds to be used for the purposes of the appellant.

We do not think that the situation in the instant case, as found by the Judge, absolves the appellant company from providing the security for the loan made to its director by the respondent. We do not think that the appellant can be absolved by s. 133(1)(a) which reads:

> 133(1) **A company** (other than an exempt private company) **shall not** make a loan to a director of the company or of a company which by virtue of s. 6 is deemed to be related to that company, or enter into any guarantee or provide any security in connection with a loan made to such a director by any other person but nothing in this section shall apply -
>
> (a) subject to subsection (2), **to anything done to provide such a director with funds to meet expenditure incurred or to be incurred by him for the purposes of the company** or for the purpose of enabling him properly to perform his duties as an officer of the company; (we have supplied the emphasis)

This section had the desired effect of prohibiting the appellant company from providing the security for the loan made to its director by the respondent. However, the prohibition would not apply if it was "done to provide such a director with funds to meet expenditure incurred or to be incurred by him for the purposes of the company." In the present case, the funds were not meant to meet the disbursements of the director so that the prohibition against the appellant company providing the security still applies.

If the appellant company wanted to borrow money, then there would not be any necessity for such a circuitous route to be taken to obtain a loan for itself. If it could offer good security, as is the case here, it would be no hardship for the appellant to borrow elsewhere. It could borrow directly from any bank or, financial institution and charged its property as security for the loan. But this was not the situation in the instant case. The appellant company only wanted to borrow from the respondent, a co-operative society, and this roundabout path was chosen to circumvent the rigours of s. 30 of the Co-operative Societies Act 1948.

Section 30 Co-operative Societies Act 1948

Section 30(1) of this Act provides:

> 30(1) **A registered society may make loans**
> (a) **to its members;**
> (b) to its employees;
> (c) to its subsidiaries; or
> (d) to another registered society which has obtained the approval of the Registrar-General as prescribed by the rules. (we have supplied the emphasis)

By this section, the respondent co-operative society could lend money to its members. Unfortunately for the appellant company it could not qualify for membership of the society. This is what s. 21(1) of the Co-operative Societies Act says:

> 21(1) In order to be qualified for membership of a registered society a person, other than a registered society shall
>
> (a) be a citizen;
>
> (b) have attained the age of eighteen years;;
>
> (c) have been born or be resident or in ownership of land within the area of operations of the registered society.

So the devise of using a director of the appellant company who is a qualified person for membership s. 21(1) was chosen to apply for membership of the society thus enabling him to apply for loan from the society. As we have pointed out earlier in this judgment, this does not absolve the appellant company from the prohibition against providing the security for the loan made to its director by the respondent. The appellant company should not have used its own director to borrow form the co-operative society. It could very easily have got round the prohibition by asking any other person who is not a director of the appellant but who is a member of the respondent to borrow from the respondent with the appellant company providing the security. But, we suppose, the appellant could not trust anyone except one of its own directors.

Conclusion

The upshot is this. Under the National Land Code the immoveable property in the instant case could be charged but the charge was subject to any prohibition imposed by written law. Section 133(1) of the Companies Act forbade the appellant company from providing the security for the loan made to its director by the respondent. The prohibition in s. 133(1) had rendered the charge unfit for registration under s. 301, condition (c) of the National Code. The charge is therefore invalid.

The appeal is allowed. We grant a declaration to declare the charge invalid as well as an order for the cancellation of the charge.

The appellant shall have the costs here and in the Court below.

Reported by Gan Peng Chiang